No. 9948

In the United States Circuit Court of Appeals for the Ninth Circuit

FREDERIC A. CLARKE, SOMETIMES KNOWN AS FREDERICK A. CLARKE, APPELLANT

v.

FEDERAL TRADE COMMISSION, APPELLEE

ON APPEAL FROM DECREE ADJUDGING APPELLANT GUILTY OF CONTEMPT OF COURT

BRIEF FOR APPELLEE

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INDEX

AUTHORITIES CITED

Cases:

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BRIEF FOR APPELLEE

I

STATEMENT OF THE CASE

This is an appeal from an order (R. 102–105) of the United States District Court for the Southern District of California, Central Division, Honorable Ben Harrison, Judge, adjudging appellant guilty of and committing him for contempt of court because of his refusal to obey orders (R. 8–9, 81–83) previously entered by that court requiring appellant to give certain testimony in a proceeding pending before the Federal Trade Commission.

Appellant is engaged in the business of manufacturing and selling in interstate commerce a drug variously designated as "Boncquet Blood Building Tablets," "Boncquet Hemo-Tabs," and "Boncquet Tablets," in

connection with which he has disseminated numerous advertisements and circulars respecting its contents and therapeutic value. Among the statements made by him is the following:

> "What are Boncquet (Bon Kay) Tablets? They constitute a food, not a drug. Comparatively recent scientific discoveries prove that the best blood builder is composed of these ingredients: Active Principle of Raw Liver, Vegetable Iron, Vitamins B and G. Boncquet Blood Building Tablets are guaranteed to contain the above ingredients in effective therapeutic amounts. Boncquet Tablets are scientifically processed to retain maximum Vitamins A, B, E, and G and essential minerals in their true organic colloidal form, easily assimilated and are strongly alkaline. They are rich in organic mineral salts, digestive enzymes, oxidizers, glandular hormones, vegetable and animal hemopocitins (blood makers). They also contain a rich supply of milk minerals giving to the body calcium and phosphorus in their true and natural proportions as found in milk." R. 39–40.

As to the therapeutic value of his Boncquet Tablets appellant asserted, among other things, that they "increase the number and color of your blood corpuscles * * * increase the blood's energizing power, and its capacity to burn toxic poisons," "nourish and stimulate the bone marrow [building] new red blood cells, rich in hemoglobin," and entirely "rebuild to normal, thin, weak, anemic blood * * * with new, rich, fighting blood" in less than a month. (R. 40, 41.)

Having reason to believe, upon the basis of a preliminary investigation, that appellant's claims with respect to Boncquet Tablets were untrue, the

Federal Trade Commission, acting in the public interest, on December 8, 1938, issued a formal complaint against appellant charging that his advertisements were false, deceptive and misleading and constituted "unfair and deceptive acts and practices in commerce" violative of Sec. 5 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 45.[1] (R. 37–44.)

After appellant had filed his answer to the complaint the matter was set down for the taking of testimony, and appellant was duly subpenaed by the Commission to appear and testify in the proceeding. (R. 3, 4, 18, 25, 51, 111.) He did appear, but on three different occasions, July 20, 1939 (R. 25–26), July 22, 1939 (R. 26–27), and June 13, 1940 (R. 27–28), he refused to answer any questions whatever. Thereafter, on May 22, 1941, the Commission, proceeding under Sec. 9 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 49, filed with the United States District Court for the Southern District of California, Central Division, an application for an order requiring appellant to appear and testify. (R. 2–7.) Upon this application an order was duly entered and filed May 23, 1941, requiring appellant to appear in the proceeding and answer all relevant and material questions propounded to him by counsel for the Federal Trade Commission and to attend before the Commission's Trial Examiner from day to day until his examination shall have been completed. (R. 8–9.)[2]

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[1] Pertinent provisions of the Federal Trade Commission Act are set forth as an Appendix to this brief, *infra* pp. 32–35.

[2] This application was made and the order taken *ex parte*. The statute does not require the giving of notice upon such application

Having been personally served with a copy of this order on June 4, 1941, appellant appeared before the Commission's Trial Examiner on July 7, 1941, but, upon being questioned in that connection by counsel for the Commission, and directed by the Trial Examiner to reply, he refused to state the quantitative analysis or proportions of the different ingredients used in the manufacture of Boncquet Tablets, contending that this information constituted a trade secret which he was privileged to refuse to reveal. (R. 30–35, 61–81.)[3] Thereupon, on application of the Commission (R. 24–47), appellant was ordered, on July 14, 1941 (R. 48), to show cause why he was not in contempt of the court's order of May 23, 1941. Subsequently, after notice and hearing in open court (R. 109–126), the

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(compare *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692, 694 (C. C. A. 10th, 1941); *National Labor Relations Board* v. *Ritholz*, 3 Fed. Rules Serv. 9 (N. D. Ill. 1940)), and no notice was given to appellant in this instance for the reason that when he was served with notice of a previous application he absented himself from the jurisdiction of the court with the result that service of the order entered thereon could not be effected. (R. 5, 15.) Appellant makes no point in his brief or Statement of Points on Appeal (R. 140–141) of the fact that the order of May 23, 1941, was issued *ex parte*. Nor could he, for not only does the statute not require notice of an application for an order requiring a witness to appear and testify, but appellant subsequently entered his appearance by motion to vacate this order (R. 9–10), which motion was duly heard and denied. (R. 29–30.) Appellant was notified of the application for and appeared to contest the entry of the order of July 18, 1941, in which he was again ordered to appear and testify. (R. 81–83. See also R. 133–136.)

[3] There is no secret about the *kinds* of ingredients used. They are, so it is asserted, stated on appellant's labels and he testified as to what they were. (R. 32, 61, 65–66.) The claimed trade secret relates only to the *quantities* of the ingredients used. Appellant also claimed that his method of manufacturing Boncquet Tablets was a trade secret. (R. 70–71.) He was not asked to disclose that, however, as counsel for the Commission did not believe it to be necessary to a determination of the truth or falsity of appellant's representations as to the composition or therapeutic value of his product.

court entered its order of July 18, 1941, again directing appellant to appear as a witness in the Federal Trade Commission proceeding and specifically to "answer the question, 'What are the proportions of the different ingredients in the product Boncquet Tablets?', and to answer any and all other relevant and proper questions respecting the quantitative formula for his product Boncquet Tablets." (R. 81–83.)[4]

Pursuant to this order appellant appeared before the Commission's Trial Examiner but again refused to state the quantitative analysis or the proportions of the different ingredients used in the manufacture of Boncquet Tablets. (R. 86–88, 110, 111–112, 116–117.) He was then ordered to show cause why he should not be adjudged in contempt of court (R. 94–96), and after notice and hearing in open court (R. 131–139) on July 30, 1941, was held in contempt of the court's orders of May 23, 1941, and July 18, 1941, and ordered committed until he should purge himself of such contempt "by answering the question, 'What are the propor-

[4] This order of July 18, 1941, also adjudged that appellant was "guilty of contempt * * * in refusing to obey the order of this court entered May 23, 1941, in refusing to answer lawful and relevant questions propounded to him on July 7, 1941" in the Commission's proceeding against him, but, as the order further stated, it "appearing to the court that [appellant] should be afforded an opportunity to purge himself of contempt by again appearing before the trial examiner of the Federal Trade Commission and answering the questions which he has heretofore refused to answer," he was not committed at the time. (R. 82.) Subsequent to the entry of this order, and upon final hearing of the order to show cause filed July 28, 1941 (R. 94–96), the court stated that it had not intended by its order of July 18, 1941, to adjudge appellant in *contempt* at that time, but merely to direct him "to answer a question instead of finding him in contempt * * * to give him an opportunity to purge himself" by answering the question at the hearing at which he was then ordered to appear. (R. 133–136.)

446692—42——2

tions of the ingredients used in Boncquet Tablets?' " (R. 102–105.)

It is from this contempt and commitment order of July 30, 1941, that appellant brings this appeal. (R. 105–106.)

II

QUESTIONS PRESENTED

The following questions are presented:

1. May the appellant on this appeal question the propriety of the court's orders of May 23, 1941, and July 18, 1941, directing him to testify in the Commission's proceeding? We submit that he may not; but if he may, then:

2. Does appellant's privilege against self-incrimination excuse him from complying with the court's orders directing him to testify? We say not.

3. Is the formula for Boncquet Tablets relevant and material to the Commission's proceeding? We maintain that it is.

4. Is the appellant privileged under the Fourth Amendment to the Federal Constitution, or otherwise, to refuse to disclose the formula for Boncquet Tablets in the Commission's proceeding against him? We say that he is not so privileged.

III

ARGUMENT

1. Introductory

The facts herein are not disputed and are set forth in our statement of the case, *supra* pp. 1–6. There is

no question but that appellant, asserting a privilege against the disclosure of trade secrets, has refused to comply with the orders of the court below directing him to testify in the Federal Trade Commission proceeding now pending against him and to disclose the quantity of each of the several ingredients used in the manufacture of Boncquet Tablets.

2. Appellant May Not in This Proceeding Question the Propriety of the Court's Orders Directing Him to Testify

Appellant appeals not from the lower court's orders directing him to testify, but from the order adjudging him in contempt and committing him for violating those orders. It cannot be denied that the court had personal jurisdiction over the appellant, and, under Sec. 9 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 49, jurisdiction over the subject matter of the Commission's application to compel him to appear and testify. That being true, the court's orders entered thereon clearly were not void.[5] The most that appellant can contend is that the orders were erroneous—and that is no defense to an action to punish him for violating them.

An order entered by a court having jurisdiction of the parties and the subject matter may not be collaterally attacked in contempt proceedings. This is true, however erroneous or improvident the order may be; and the fact that it was erroneously or improvidently granted will not excuse disobedience of it.

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[5] The order of May 23, 1941 (R. 8–9), was personally served on appellant on June 4, 1941 (R. 29). The order of July 18, 1941 (R. 81–83), was made in open court in the presence of the appellant and his counsel. (R. 86–88, 92–93, 100, 125.)

The remedy of the complaining party is by appeal from the order; until vacated it is binding upon him and, unless absolutely void for lack of jurisdiction, its validity cannot be challenged upon appeal from a decree punishing him for its violation. 6 R. C. L. 505; 17 C. J. S. 21, 165–166. As declared in *Brotherhood of Railway & S. S. Clerks* v. *Texas & N. O. R. Co.* 24 F. 2d 426, 427 (S. D. Tex. 1928):

> "It is fundamental that 'a person proceeded against' in a contempt case 'for disobeying an injunction can never set up as a defense that the court erred in issuing it. * * * Errors must be corrected by appeal, and not by disobedience.' * * * And 'that a respondent in a contempt case may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void.' "

The rule was thus stated in *Howat* v. *Kansas,* 258 U. S. 181, 189–190 (1922):

> "An injunction duly issuing out of a court of general jurisdiction * * * must be obeyed * * * however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." [6]

Appellant did not appeal from the court's orders directing him to state the quantitative analysis of his tablets; he elected instead to leave the validity of the

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[6] See also *Drew* v. *Superior Court*, 47 Cal. App. 150, 190, P. 374, 376 (1920); *Beauchamp* v. *United States*, 76 F. 2d 663, 668 (C. C. A. 9th, 1935).

orders unchallenged and to defy the court which entered them. As we shall hereafter show, *infra* pp. 12–31, those orders were entirely lawful and proper in every respect; but if that were not the case, the orders having been entered in a cause in which the court's jurisdiction over the appellant and the subject matter is not questioned, and not having been set aside or reversed, their validity and propriety are not subject to review in this proceeding. The appellant is clearly in contempt of them, and the lower court's order so adjudging and committing him should be affirmed.

On this clear ground alone, we submit, appellant's appeal can be disposed of. We do not mean to imply otherwise by passing on to a discussion of the other questions raised.

3. The Privilege Against Self-Incrimination Does Not Excuse Appellant From Complying With the Court's Orders to Testify

At pp. 20–22 of his brief appellant contends that he is privileged to refuse to disclose the formula for Boncquet Tablets on the ground that such evidence "may be used as the basis of a criminal prosecution against him." He fails, however, to indicate in what manner this would or might occur, resting his claim upon a bare assertion of the privilege against self-incrimination. A complete answer to the contention would seem to be found in this Court's ruling in *Graham* v. *United States,* 99 F. 2d 746, 750 (C. C. A. 9th, 1938), to the effect that:

> "[A witness'] mere assertion, however advanced, that in his opinion the answer to a given question would tend

> to incriminate him is not sufficient to justify the witness in refusal to answer unless and until a sufficient showing is made to the court that the claim of the witness is a substantial one. That is, the court must be convinced that the answer of the witness would be calculated to incriminate him if he was guilty of an offense foreshadowed by the question."

Further than this, appellant did not claim a privilege against self-incrimination when he declined to disclose his formula. He was expressly asked by the Trial Examiner, "Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?" His reply was, "Well, it wouldn't tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights." (R. 34, 67, 112.)

The claim of the privilege is made for the first time in appellant's brief on this appeal, not even being set forth in his statement of points intended to be relied on herein. (R. 140–141.) In these circumstances the privilege must be deemed to have been waived, for its availability depends "not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made." *United States* v. *Murdock,* 284 U. S. 141, 148 (1931); 6 Jones, Evidence (2nd ed., 1926) Secs. 2489, 2493. As said in *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113 (1927), a case in which, as here, the appellant did not assert his privilege against self-incrimination below but claimed it for the first time on appeal:

> "His assertion of it here is evidently an afterthought. It is for the tribunal conducting the trial to determine what weight should be given to the contention of the

> witness that the answer sought will incriminate him, * * * a determination which it cannot make if not advised of the contention. * * * The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it."

Finally, it may be said, whatever merit might otherwise attach to appellant's claim, Sec. 9 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 49, deprives it of all substance. That section provides:

> "No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it * * *."

The immunity thereby afforded appellant is complete. That being true, having been duly subpoenaed by the Commission[7] and ordered by the Court[8] to appear and testify, appellant cannot excuse his failure to do so on the ground that his testimony might have or would incriminate him. The "constitutional guarantee of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony even although the testimony when given might serve to incriminate the one testifying,

[7] R. 3, 4, 18, 25, 51, 111.
[8] R. 8-9, 81-83, 125.

provided immunity be accorded." *Glickstein* v. *United States,* 222 U. S. 139, 141 (1911); *Hale* v. *Henkel,* 201 U. S. 43, 66 (1906).

4. Appellant's Formula For Boncquet Tablets Is Relevant and Material Evidence in the Commission's Proceedings Against Him

Appellant is in error in stating on p. 18 of his brief (see also pp. 7, 14, 16) that "There is no charge in the complaint that he has ever advertised falsely * * * as to the proportions in which he uses [various] ingredients." Since the complaint challenges the truth of appellant's statements respecting the therapeutic value of his product, as he recognizes at pp. 5, 7, 18 and 19 of his brief, the quantity of each of the ingredients used in compounding it is necessarily also questioned, for without knowledge of the quantity as well as the kinds of ingredients employed in its manufacture its therapeutic value obviously cannot be determined.

In addition to this, the Commission's complaint (R. 37–44) expressly charges that appellant's representations "descriptive of [his] drug and of its effectiveness in use" are false. (R. 42.) Among the representations thus challenged are those to the effect that Boncquet Tablets "constitute a food, not a drug," that they "are guaranteed to contain [specified] ingredients in effective therapeutic amounts" (R. 39), and that they "are rich in organic mineral salts, digestive enzymes, oxidizers, glandular hormones, [and] vegetable and animal hemopocitins." (R. 39–40.) The complaint therefore places directly in issue not

only appellant's claims respecting the therapeutic value and effectiveness of his product, but also his claims as to its quantitative contents—it challenges appellant's assertions as to what his preparation *is*, as well as his assertions as to what it does. The truth of his claims as to the effective amounts and nature of the ingredients contained in Boncquet Tablets being in issue, evidence of their quantitative composition is as clearly relevant as is evidence of their qualitative composition,[9] and appellant does not contend that evidence as to the latter is irrelevant or immaterial.

Not only is evidence as to the quantitative analysis of appellant's formula relevant and material, it is *essential* to the Commission's case, for without it the Commission cannot determine the truth or falsity of appellant's representations, as it was shown by qualified experts that the quantities of the various ingredients used by appellant cannot be ascertained by chemical or microscopic analyses or by any other known tests.[10] This was apparently demonstrated to the satisfaction of the lower court which declared "that in order to ascertain the facts it will be *necessary* for the witness to answer the question" calling for a statement of the quantitative contents of his preparation. (R. 123. Italics supplied.)

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[9] As the court stated in *Horlick's Malted Milk Co.* v. *Spiegel*, 155 Wis. 201, 144 N. W. 272, 277 (1913), "The ingredients of the plaintiff's product involved a vital issue in the case, because it was necessary to determine whether plaintiff's product was what it was represented to be; therefore the evidence as to what the ingredients are was relevant to the issue."

[10] Transcript of testimony before the Commission, pp. 253–258, 262, 266, 268, 272, 275. See also R. 31, 64–65.

Appellant also argues that this evidence is irrelevant and immaterial because intended to "be used [by the Commission] as a basis for the expression of an opinion by a medical expert, as to the therapeutic value" of appellant's tablets. (Appellant's brief, p. 5.) He contends that such evidence is "*secondary* opinion evidence" (*id.* p. 6) to which it is unnecessary and improper to resort in view of the fact that "primary evidences of clinical observations of the results of the use of" his product may be obtained. (*Id.* pp. 6, 10, 18–19.) It is to be observed that appellant cites no authorities to support this argument, which proceeds upon a misconception of the so-called "best evidence" rule.

Apart from a few exceptions, such as the preference for an attesting witness, "there is *no general principle* that the 'best evidence' must be procured, in the sense that a *specific witness, presumably better qualified* than other competent witnesses, *must be produced or accounted for* before the others can be used." 4 Wigmore, Evidence (3rd ed., 1940) Secs. 1286, 1338. The rule "has nothing to do with the choice of witnesses. It never excludes a witness upon the ground that another is more credible or reliable." 2 Jones, *op. cit. supra,* 1400. The so-called best evidence rule relates to documents, and does no more than merely prohibit the proof of "the contents of a * * * written instrument * * * by parol when the instrument itself can be produced." *Id.,* 1400, 1401, 1404.

It is well established that the opinions of properly qualified medical experts are competent upon the ques-

tion of the therapeutic value and effect of drugs.[11] And this is true notwithstanding the fact that the witnesses might have had no experience in their actual use.[12] Thus in the recent case of *Justin Haynes & Co.* v. *Federal Trade Commission,* 105 F 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939), it was contended that the Commission's findings that a certain preparation was of little or no therapeutic value should be set aside for the reason that the experts upon whose testimony the Commission relied had had no personal experience with the preparation. The court rejected this contention, stating:

> "These findings are supported by the testimony of the three expert witnesses called by the Commission; and in the light of such testimony there can be no doubt that the petitioner's advertisements were grossly exaggerated and misleading. It is true that these witnesses had no personal experience with Aspirub and based their opinions upon their general medical and pharmacological knowledge. They were, however, well-qualified expert witnesses, and the fact that other experts called by the petitioner expressed a contrary opinion and testified to experiments cannot enable the petitioner to contend successfully that there was no substantial evidence to support the Commission's findings."

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[11] *Alberty* v. *Federal Trade Commission,* 118 F. 2d 669 (C. C. A. 9th, 1941), cert. denied — U. S. —, October 13, 1941; *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission,* 77 F. 2d 886 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935); *Manhattan Oil Co.* v. *Mosby,* 72 F. 2d 840, 844 (C. C. A. 8th, 1934), cert. denied 293 U. S. 623 (1934); *W. B. Wood Mfg. Co.* v. *United States,* 292 F. 133 (C. C. A. 8th, 1923); *Kar-Ru Chemical Co.* v. *United States,* 264 F. 921, 928 (C. C. A. 9th, 1920); *Eleven Gross Packages* v. *United States,* 233 F. 71 (C. C. A. 3rd, 1916); *Samuels* v. *United States,* 232 F. 536, 542 (C. C. A. 8th, 1916); *Moses* v. *United States,* 221 F. 863, 868–870 (C. C. A. 2nd, 1915); 2 Wigmore, *op. cit. supra,* Sec. 569; 3 Jones, *op. cit. supra,* 1345; 22 C. J. 544.

[12] *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission,* 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *State* v. *Donovan,* 128 Iowa 44, 102 N. W. 791, 793 (1905); *Boswell* v. *State,* 114 Ga. 40, 39 S. E. 897, 898 (1901).

Still more recently the rule was approved by the Fourth Circuit in *Neff* v. *Federal Trade Commission,* 117 F. 2d 495, 496–497 (C. C. A. 4th, 1941), where it was said:

> "[Petitioner] argues that where there is direct testimony based upon actual experience, the opinion evidence of experts based upon general knowledge of a subject must be disregarded, and hence the finding of the Commission in this case cannot be deemed to be supported by substantial evidence * * *.
>
> "The actual question now presented is whether the testimony of the six experts who testified for the Commission can be considered substantial evidence in view of their lack of actual experience in the use of the petitioner's preparation, as compared with the conflicting statements of doctors who had administered Glantex to their patients. We think that the evidence is sufficient to support the Commission's finding. All of the experts were well qualified to speak upon the subject; and their opinions, though based only upon their general medical and pharmacological knowledge, constituted substantial evidence tending to show that the representations of the petitioner were not justified."

To the same effect is *Goodwin* v. *United States,* 2 F. 2d 200, 201 (C. C. A. 6th, 1924), where the court held:

> "Upon the trial of the issue of fact joined by the libel charging the misbranding of mineral water and the answer of the intervener, expert evidence may be properly admitted. If it appears from the testimony of a witness upon preliminary examination that he is learned in the science of chemistry or has been regularly and legally admitted to the practice of medicine, and that he has knowledge of the drug elements contained in the article transported in interstate commerce and their efficacy or lack of efficacy as curative agents, used either

> separately or in combination in the treatment of the diseases specified on the label, his opinion on that subject is competent evidence regardless of whether he has had actual experience or observation of the effect of the use of such drugs * * *."

It has indeed been held that individual case histories are not competent to establish the therapeutic effect of medical preparations, as was declared in *Commonwealth* v. *Jacobson,* 183 Mass. 242, 66 N. E. 719, 721 (1903), aff'd *sub nom. Massachusetts* v. *Jacobson,* 197 U. S. 11 (1905), where the defendant offered to prove by case histories that vaccination against smallpox was inefficacious and dangerous. The Supreme Judicial Court of Massachusetts held that the exclusion of such evidence was proper, stating:

> "The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts giving their opinions. It would not have been competent to introduce the medical history of individual cases." [13]

The quantities of the various ingredients employed in the preparation of appellant's tablets may be so great as to be harmful or dangerous to human life or so small as to have no therapeutic effect or value. In

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[13] Compare *United States* v. *Lee,* 107 F. 2d 522, 526–527 (C. C. A., 7th, 1939), cert. denied 309 U. S. 659 (1940); *United States* v. *141 Bottles,* U. S. Dept of Agriculture Notices of Judgment under the Food and Drugs Act, 7901–9000, Notice No. 8360, p. 232, 234 (S. D. Tex. 1919), aff'd *sub nom. Hall* v. *United States,* 267 F. 795 (C. C. A. 5th, 1920) (where the district court said, "* * * the slightest reflection upon the well-known fact that persons given to self-medication are credulous and partisan, and prone to deny nature credit for their recovery, and that on this well-known trait of human nature these compounders of specifics and nostrums build their business, deprives [testimonial letters about cures in specific cases] of any weighty significance; because it will not do for a person who has been able to prey upon the credulity of a community to escape the consequences of his acts by the very success of his scheme").

either case, his representations would be false and misleading. Their truth or falsity cannot be established except by expert testimony based on an accurate knowledge of the quantitative contents of his preparation. The question calling for a disclosure of this information is clearly relevant and material and the testimony of medical experts as to its effectiveness and therapeutic value is competent.

5. Appellant Is Not Privileged Under the Fourth Amendment to the Federal Constitution, or Otherwise, From Disclosing His Formula For Boncquet Tablets

Appellant contends that the lower court's orders directing him to state the proportions of various ingredients used in the manufacture of his tablets are in "violation of appellant's rights under the Fourth Amendment to the Constitution of the United States," prohibiting unreasonable searches and seizures. (R. 140. Appellant's brief, pp. 8, 10, 22.) He cites no cases to support this contention, which, we think, is clearly without merit.

The Fourth Amendment relates to "unreasonable searches and seizures"; it has no application to the problem of testimonial compulsion. Appellant's argument that the lower court's orders directing him to testify in the Commission's proceeding violates the Fourth Amendment "is answered by the fact that it does not call for the production or inspection of any of appellant's books or papers". *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 145 (1937).[14]

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[14] *Olmstead* v. *United States*, 277 U. S. 438, 463–465 (1928); *Boyd* v. *United States*, 116 U. S. 616, 630, 632 (1886); *Nuesslein* v. *District of Columbia*, 115 F. 2d 690, 692–693 (App. D. C. 1940); *Federal Trade Com-*

Appellant also contends that the orders of the lower court directing him to testify are void for the reason that they require him to disclose a valuable trade secret which he is privileged to refuse to reveal. (Appellant's brief, pp. 11–19.)

It is well settled that there is no absolute privilege to refuse to disclose a trade secret. Where such a secret is relevant "to an issue and disclosure [is] essential to a correct determination, a witness is not privileged to refuse to disclose it." 70 C. J. 743; 6 Jones, *op. cit. supra,* 4910. Wigmore states that "the presumption should be against" the privilege, that:

> "* * * A person claiming that he needs to keep these things secret at all should be expected to make the exigency particularly plain. * * * [The] occasion for demanding such a privilege arises usually in actions where the party claiming it is one charged with * * * wrongful competition in business, and * * * in such cases, it might amount practically to a legal sanction of the wrong if the Court conceded to the alleged wrongdoer the privilege of keeping his doings secret from judicial investigation. No privilege at all should there be conceded * * *. [Even] where the claimant of the privilege is not a party charged with fraud, *no privilege of secrecy should be recognized if the rights of possibly innocent persons depend essentially or chiefly, for their ascertainment, upon the disclosure in question.*
>
> "In short, the privilege should be conceded in those cases only where the disclosure of the facts by the particular channel of the witness in question is but a *subordinate* means of proof, relative to the other evidence

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mission v. *National Biscuit Co.*, 18 F. Supp. 667, 671 (D. C. N. Y. 1937); *In re Keegan*, 18 F. Supp. 746, 747–748 (D. C. N. Y. 1937); *McMann* v. *Engel*, 16 F. Supp. 446, 448 (S. D. N. Y. 1936), aff'd *sub nom. McMann* v. *Securities & Exchange Commission*, 87 F. 2d 377 (C. C. A. 2nd, 1937), cert. denied, 301 U. S. 684 (1937).

> available in the case; for without some such limitation the general principle cannot be enforced that *testimonial duty to the community is paramount to private interests* * * *." 8 Wigmore, *op. cit. supra,* Sec. 2212. Italics supplied.

At most the privilege to refuse to disclose trade secrets is a limited or qualified privilege. None of the cases cited by appellant holds that it is absolute, none of them supports appellant's contention that he is entitled to invoke it in this case, and we have been able to find none.

In *Star Kidney Pad Co.* v. *Greenwood,* 3 Ontario Rep. 280 (1883), cited by appellant on p. 12 of his brief, plaintiff sued to recover the purchase price of certain kidney pads sold to the defendant, who pleaded a failure of consideration in that the pads were of no curative or healing value and demanded that the plaintiff disclose their composition. Plaintiff contended that the defendant had not been induced to buy the pads upon the basis of any representations in that connection and that it would be injurious to the plaintiff to be compelled to disclose the trade secret by which they were manufactured. The court held that in these circumstances, the defendant having testified that none of the representations which induced his purchase of the pads "related to what the pad was made of" (3 Ontario Rep. at 281), he was not entitled to a discovery of the plaintiff's trade secret, that "the defendant's defence does not depend upon the composition of the pad * * * as its composition was in no sense a part of the consideration for [their] purchase * * *." (*Id.* at 283.) The court

therefore regarded the evidence as immaterial, and declared that it was not moved "to exercise its power to compel a discovery" of the information sought. (*Ibid.*) It will be noted that so far from holding that there is an absolute privilege against the disclosure of trade secrets, the court clearly recognized its power to compel their disclosure in a proper case and based its refusal to do so in this instance upon the ground that the secret was immaterial. In the instant case, as heretofore shown, appellant's trade secret is not immaterial, a fact which clearly distinguishes this case from the *Kidney Pad* case.

United States v. *Basic Products Co.,* 260 F. 472 (W. D. Penn. 1919), cited on p. 13 of appellant's brief, merely holds that in the exercise of its *investigative* powers under Secs. 6 and 9 of the Federal Trade Commission Act, 15 U. S. C. A. Secs. 46, 49, the Commission is not entitled to access to the books and papers of a corporation not alleged to be engaged in interstate commerce nor charged with a violation of the Act. Unlike the principal case, no complaint had been filed against the defendant there, and the court's reference to the disclosure of trade secrets as an objectionable "incident of such investigation" was dictum.

In *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298 (1924) and *Federal Trade Commission* v. *P. Lorillard Co.,* 283 F. 999 (D. C. N. Y. 1922), aff'd 264 U. S. 298 (1924), cited on pp. 14 and 15 of appellant's brief, it was simply held that the Federal Trade Commission, in conducting investigations unders Secs. 6 and 9 of the Federal Trade

Commission Act, was not entitled to an *unlimited* right of access to the defendants' papers, relevant and irrelevant, and some of which related to intrastate commerce only, on the possibility that they might disclose evidence of violation of law. As in the *Basic Products* case, no formal complaint had been filed against the defendants in either of those cases.

Moxie Nerve-Food Co. v. *Beach,* 35 F. 465 (C. C. Mass. 1888), cited on p. 16 of appellant's brief, went no further than to hold that a witness could not on cross-examination be required to state the ingredients of a tonic when the question exceeded the scope of his direct examination. The court's recognition of the fact that there is no absolute privilege against the disclosure of trade secrets is implicit in its dictum to the effect that it had "grave doubt whether the witness can be obliged, *under the circumstances existing in this case,* to disclose" the secret. (35 F. at 466. Italics supplied.)

The remainder of the cases relied on or sought to be distinguished by the appellant support the validity of the lower court's orders directing him to testify.

In *Moxie Nerve Food Co.* v. *Modox Co.,* 152 F. 493 (C. C. R. I. 1907), complainant, a manufacturer of a so-called "liquid nerve tonic", sought an injunction against infringement of its trade-mark rights, imitation of its trade name and various acts of unfair competition. Defendant contended that the complainant had been guilty of such false representations in connection with the sale of its tonic that it was not entitled to equitable relief. On final hear-

ing, it appearing that the complainant had made numerous extravagant representations with respect to the therapeutic value of its product but had offered no proof as to its ingredients, claiming that its formula was a trade secret privileged against disclosure, the court denied relief, stating:

> "The proprietor of a secret preparation may justly claim protection of a trade secret, but to the extent of his representations to the public secrecy is waived; and there is no hardship in requiring a complainant who has stated certain things to the public as truths in order to promote the sale of his goods to * * * prove them as truths, in order to secure equitable relief. The right to preserve a trade secret does not carry with it a general right to have one's bare word or unsworn statement accepted in a court of equity, or excuse a failure to prove the truth of what is published to the public. To the extent that a manufacturer of goods chooses to reveal their character and composition to the public—to that extent he waives the right of secrecy in a court of equity." 152 F. at 498.
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> "The representation upon the label of a package is a material part of the vendor's business, and no undue hardship or inconvenience will result to an honest vendor if he is required to prove the truth of his label as he is required to prove the truth of any other material fact. This rule, I am aware, may prove exceedingly embarrassing to many vendors of patent medicines, but only to those who are guilty of misrepresentation and deceit. It need not prove embarrassing to one who wishes to keep a trade secret, for he need only forbear publishing what he does not care to prove." *Id.* at 500.[15]

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[15] See also *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516 (1903); *Memphis Keeley Institute* v. *Leslie E. Keeley Co.*, 155 F. 964 (C. C. A. 6th, 1907); *Drake* v. *Herrman*, 261 N. Y. 414, 185 N. E. 685, 686 (1933) ("Generally, disclosure of legitimate trade secrets will not be required

In *Coca-Cola Co.* v. *Joseph C. Wirthman Drug Co.,* 48 F. 2d 743 (C. C. A. 8th, 1931), paintiff appealed from a decree dismissing a bill to enjoin the defendant from passing off diluted coca-cola syrup as genuine. Desiring to protect as a trade secret its formula for the manufacture of syrup, plaintiff did not disclose the formula but sought instead to prove the defendant's alleged wrongful conduct by evidence as to comparative chemical analyses of genuine syrup and the syrup sold by the defendant. (48 F. 2d at 744–745.) The trial court held that this evidence was not competent for the reason that the genuineness of the syrup sold by defendant was "to be determined upon the facts in evidence, not upon a comparison of one fact in evidence with another which is not in evidence." (*Id.* at 746.) This ruling was sustained on appeal, the circuit court of appeals stating:

> "Obviously the case is one where the burden is upon the appellant to prove the dilution by competent evidence. Where that character of evidence is within its control it cannot avoid producing it solely because to do so would reveal its trade secret." *Id.* at 747.

In *DuBois* v. *Thomas,* 154 Miss. 286, 122 So. 495 (1929), complainant sued in equity to compel specific performance of a contract to build and equip a mill for the manufacture of paper by an alleged secret formula. Defendant contended that she was induced to enter into the contract by complainant's repre-

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except to the extent that it appears to be indispensable for ascertainment of the truth. * * * There can, of course, be no legal sanction for the circulation of poison throughout the community, and if this product does include inherently dangerous substances, the secrecy of its manufacture ought not to be protected.").

sentations that the use of his formula made possible the manufacture of a higher grade of paper at less expense than customary processes, that these representations were false and fraudulent and the complainant's formula was wholly without value. On cross-examination complainant refused to disclose his formula on the ground that it was a trade secret. The trial court upheld this contention and entered a decree in his favor. On appeal this ruling was reversed, it being held that:

> "A witness has a qualified, but not an absolute, privilege of refusing to disclose trade secrets when the disclosure thereof would depreciate their value. He should not be compelled to disclose such secrets where so to do is not essential to the ends of justice; but where a trade secret is relative to an issue being tried, and its disclosure is essential in order that the issue may be correctly determined and justice administered accordingly, a witness is not privileged to refuse to disclose it. To hold otherwise would violate the general principle 'that testimonial duty to the community is paramount to private interests, and that no man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced.'" 122 So. at 495–496.

In *Willson* v. *Superior Court,* 66 Cal. App. 275, 225 P. 881 (1924), appellant had been sued in a personal injury action growing out of the explosion of a flare manufactured by him. During the trial of the case counsel for the injured party asked him to state the constituents of the flare. This the appellant declined to do on the ground that its composition was a trade secret. The trial court directed him to answer the question, and adjudged him guilty of contempt

when he refused to do so. From this judgment appellant appealed, contending that the trial court had no power to direct him to disclose his trade secret. It was held that the trial court's action was proper, the appellate court stating:

> "While it may be of great pecuniary importance to the owner of a trade secret * * * that the formula for [his product's] production remain undisclosed, it may also well be of greater comparative consequence to one injured by or through its use that the secret be divulged in order that the rights of the injured person may be adequately protected. The right of the manufacturer to the protection of his trade secret ought to yield to the superior right of an innocent person who has suffered injury through no fault of his own * * *. It would, indeed, be a dangerous principle and one inimical to the standards of justice, to hold that the right of an injured innocent person to redress should be withheld solely because the person causing the injury and responsible therefor was in possession of certain facts, however consequential to his private interests, without the disclosure of which such right could not be determined or enforced, and thus, in effect, uphold the wrongdoes in his wrongdoing. No man is entitled to be protected in his proper right to a trade secret where, by the exercise of such right, he has wrought an injury to another and the disclosure of such secret is indispensable to the ascertainment of the truth and the ultimate determination of the civil rights of the parties." 225 P. at 883.

In *Gossman* v. *Rosenberg,* 237 Mass. 122, 129 N. E. 424 (1921), plaintiff brought an action in contract to recover losses sustained in a joint venture involving the purchase and sale of merchandise. On cross-examination he declined to disclose the details of certain of his operations on the ground that they were

trade secrets privileged against disclosure. The trial court's action in sustaining this contention was held erroneous, the court stating:

> "Upon the issue of the full truth of the items of expenditure stated in the account, it would seem to be plain that the name of the person of whom and to whom the plaintiff bought and sold the merchandise, as also the name of the person to whom he claimed to have paid a commission, were directly relevant to the issues * * *. A fair and full cross-examination to develop facts in issue or relevant to the issue is a matter of absolute right and is not a mere privilege to be exercised at the sound discretion of the presiding judge * * *. The statement of the judge when refusing to admit the evidence, 'I suppose your question is a proper one,' is apparently a recognition of the generally accepted rule * * *. His refusal to admit the cross-examination was squarely based upon a supposed right or privilege of the witness to refuse to disclose trade secrets however relevant to the matter in issue. The position and claim is essentially unsound * * *." 129 N. E. at 425–426.

The authorities, it is submitted, clearly sustain the validity of the court's orders directing the appellant to reveal his formula for Boncquet Tablets. Evidence of their quantitative composition is not only relevant and material, it is essential to the proper determination, for the benefit of the public, of the truth or falsity of the statements made by appellant to induce the purchase of his drug.

It cannot be questioned that it is in the public interest to prevent the sale of commodities by the use of false and misleading representations. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, 494 (1922); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade*

Commission, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission,* 77 F. 2d 886, 887 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935). By Sec. 5 of the Federal Trade Commission Act, the Commission is "directed" to do so, and, to enable it to perform that duty, it is expressly authorized by Sec. 9 of the Act "to require * * * the attendance and testimony of witnesses" and to invoke the aid of the courts to compel the giving of "evidence touching the matter in question" in the case of recalcitrant witnesses. 15 U. S. C. A. Secs. 45, 49. This language, not qualified or limited by any exception, necessarily means the attendance of *any* witness and the giving of *any* testimony, including that disclosing trade secrets, relevant to the determination of every material fact in issue in Commission proceedings.[16]

In these circumstances, there being no express declaration by Congress to that effect, a respondent has no right to shroud in secrecy the facts by which the truth or falsity of his public representations must be assayed, for "there is no privilege of silence when reticence, if tolerated, would thwart the public good." *In re Edge Ho Holding Corp.,* 256 N. Y. 374, 176 N. E. 537, 539 (1931). If this were not the case, the harm

[16] As heretofore indicated, *supra* pp. 9–12, not even the privilege against self-incrimination may be invoked. 15 U. S. C. A. Sec. 49. Under Sec. 11 of the National Labor Relations Act, 29 U. S. C. A. Sec. 161, relating to the attendance of witnesses and the taking of testimony in Labor Board proceedings, the provisions of which are essentially the same as those of Sec. 9 of the Federal Trade Commission Act, it has been held that, "The only limitation upon the power of the Board to compel the production of documentary or oral evidence is that it must relate to or touch the matter under investigation or in question." *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. 2d 692, 694 (C. C. A. 10th, 1941).

which could be visited upon the public by manufacturers of worthless or dangerous nostrums and devices can scarcely be exaggerated, and the Commission would be seriously handicapped, if not rendered substantially powerless, to take effective action in the public interest. "The suppression of truth is a grievous necessity at best, more especially when * * * the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *McMann* v. *Securities & Exchange Commission, supra,* 87 F. 2d at 378. Appellant's interest here is not of that character.

The fact that Congress contemplated that the Federal Trade Commission would come into the possession of trade secrets, and intended that it should, is clear from Sec. 6 (f) of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 46 (f), prohibiting the disclosure of "trade secrets and names of customers" obtained in the exercise of the *investigative* powers granted to the Commission in that section.[17] Had Con-

[17] Sec. 10 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 50, makes it a criminal offense for any officer or employee of the Commission to disclose, without its authority, any information obtained by it. It is likewise a violation of the Criminal Code of the United States, 18 U. S. C. A. Sec. 216, for any Federal employee "to divulge or to make known in any manner whatever not provided by law * * * the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties * * *." Preliminary to the issuance of the Commission's formal complaint against appellant, the Commission made the customary investigation which precedes the filing of such complaints and requested appellant to disclose his formula. This he declined to do. If he had complied with the Commission's request, medical experts employed by the Commission could have determined whether his representations as to the contents and therapeutic value of his tablets were true. Had they so found, there would have been no occasion for the filing of a complaint against the appellant or for a public disclosure of his formula. Its secrecy would have been fully protected,

gress also intended to protect or to prohibit the Commission from requiring the disclosure of relevant trade secrets upon the trial of formal complaints issued under Sec. 5, it would have so provided either in that section or in Sec. 9, quoted above, authorizing compulsory process to require the attendance and testimony of witnesses. No such prohibition appears, however, and the authority of the Commission to require the giving of testimony must be construed to include testimony as to trade secrets.

That Congress had the power to grant such authority cannot be doubted, for its power to regulate and protect interstate commerce, in the exercise of which the Federal Trade Commission Act was passed, is plenary and complete, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 37 (1937); it resembles in character and is certainly as great as the police powers of the states, *Kentucky Whip & Collar Co.* v. *Illinois Central R. R.,* 299 U. S. 334, 345–347, 352 (1937); *Seven Cases* v. *United States,* 239 U. S. 510, 514–515 (1916), and it is well settled that in the exercise of those powers states may lawfully require the disclosure of trade secrets. *National Fertilizer Assn.* v. *Bradley,* 301 U. S. 178, 182 (1937); *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427, 431–432 (1919). As the Supreme Court said in another connection in the *Seven Cases* case, *supra:*

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for the Commission would have had no cause to disclose it, and its employees would have been prohibited from doing so under both the penal provisions of Sec. 10 of the Federal Trade Commission Act and the Criminal Code.

"It cannot be said * * * that one who should put * * * a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power." 239 U. S. at 518.

IV

CONCLUSION

Appellant cannot on this appeal from an order adjudging him in contempt of and committing him for his refusal to comply with the orders directing him to reveal his formula for Boncquet Tablets collaterally attack or question the validity of those orders. The orders so directing him to testify, however, were in any event valid and proper in every respect.

The Federal Trade Commission therefore prays that this Court affirm the order from which appellant prosecutes his appeal.

Respectfully submitted.

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WASHINGTON, D. C., *February 20, 1942.*

APPENDIX

Relevant portions of the Federal Trade Commission Act (Act of September 26, 1914, 38 Stat. 717, as amended by Act approved March 21, 1938, 52 Stat. 111; 15 U. S. C. A. Secs. 41–58)

SEC. 5 [15 U. S. C. A. Sec. 45] (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * The testimony in any such proceeding shall be reduced to writing and filed in

the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * *

(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive. * * *

SEC. 9. [15 U. S. C. A. Sec. 49] That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any mem-

ber of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence..

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. * * *

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall

be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. [15 U. S. C. A. Sec. 50] That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. * * *

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

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